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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1021

WALT DISNEY PRODUCTIONS, a corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Walt Disney Productions, a corporation, respectfully petitions that a writ of certiorari issue to review the final judgment of the Circuit Court of Appeals for the Ninth Circuit in that certain cause therein entitled "National Labor Relations Board, Petitioner, vs. Walt Disney Productions, Respondent," being therein numbered 10603. Said judgment was entered by said Circuit Court of Appeals on December 5, 1944. [R. 1376.] A petition for rehearing was filed by Walt Disney Productions within the time allowed therefor by rule of court and an order denying said petition for rehearing was filed on January 6, 1945. [R. 1395.]

Opinion Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit in this cause is set forth in full at R. 1377.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. (28 U. S. C. A., Section 347(a).)

Questions Presented.

1. Must not resort be had to the grievance and arbitration procedure established in an existing collective bargaining agreement before an assertedly improper discharge case may be carried by the employee to the National Labor Relations Board as an alleged unfair labor practice when the employer is ready and willing to arbitrate?

2. Is not the Circuit Court of Appeals in error in this proceeding in not holding, in accordance with decisions of the Second, Fourth, Fifth and Seventh Circuit Courts of Appeals, that there must be findings supported by the evidence that the *purpose* and *effect* of the asserted discharge was to encourage or discourage membership in any labor organization within the meaning of Section 8(3) of the Act, in order to uphold the Board's order? Can there be any such *effect* where there is a *closed-shop* collective bargaining agreement in effect at all times?

3. Is not the Board's order of reinstatement of the employee (now in the armed forces) punitive and erroneous as imposing conditions of reinstatement more onerous than those governing reinstatement of returning members of the armed forces generally under the Selective Training and Service Act of 1940, as amended?

Summary Statement of Matter Involved.

Petitioner Walt Disney Productions is a California corporation engaged in the production of animated motion pictures and sound cartoons.

The National Labor Relations Board issued a complaint against petitioner, alleging an unfair labor practice within the meaning of Section 8(1) and (3) of the National Labor Relations Act (29 U. S. C. A. 158 (1) and (3)), on the ground that petitioner had, on November 24, 1941, discriminatorily discharged Arthur Babbitt, an animator in petitioner's employ, for engaging in union activities. Babbitt was and is a member of Screen Cartoonists' Local 852, affiliated with the American Federation of Labor's Brotherhood of Painters, Decorators and Paperhangers of America (herein called "the Union").

After a hearing in October, 1942, the Trial Examiner recommended findings and conclusions that Babbitt had been discriminatorily* discharged and that unfair labor practices had been committed by petitioner, and recommended a cease and desist order, together with an order of reinstatement of Babbitt. The Board, in March, 1943,

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*Petitioner denied any discriminatory intent or purpose in the Babbitt layoff and submitted a large volume of evidence which it believed disproved the charge. The Trial Examiner and the Board completely disregarded the main portions of petitioner's evidence on this issue. This disregard of evidence, much of it undisputed, was urged as error before the Circuit Court of Appeals, but that Court adopted the view that it was bound by the Board's findings, as it concluded there was some evidence in support of the material findings. While petitioner believes serious error was committed in this respect, it recognizes that, under the rules governing the issuance of a writ of certiorari by this Honorable Court, this is not the type of issue this Court will consider, and hence petitioner will refrain from attempting to inject any such issue into this Petition and Brief.

adopted the recommended findings and conclusions, entered a cease and desist order, and ordered that petitioner reinstate Babbitt with back pay. The Board, in November, 1943, petitioned the Ninth Circuit Court of Appeals for enforcement of said order. The Ninth Circuit Court of Appeals, on December 5, 1944, entered its decree granting the Board's petition to enforce said order with certain modifications, namely, (i) that Babbitt's back pay should commence only from the date he filed his charge with the Board rather than the date of his discharge, due to his delay in filing the charge, (ii) that the blanket cease and desist order should be deleted, and (iii) clarifying certain general language of the Board's order. [R. 1392, 1389-1391.]

Only a few of the facts involved in this proceeding need be stated to raise the issues that petitioner calls to the attention of this Court:

Babbitt had become a member of the United States armed forces in November of 1942, after the hearing before the Trial Examiner, and after the Trial Examiner had made his recommended findings, conclusions and order. This circumstance was brought to the Board's attention by stipulation. [R. 108.] The Board's order took this fact into consideration to a certain extent in ordering petitioner to offer Babbitt reinstatement upon his discharge from the armed forces. [R. 115.] However, the Board and the Court below erred, we will urge in this Petition and Brief, in not imposing certain limitations upon the reinstatement order in view of the employee's status in the armed services. It might be mentioned that Babbitt is still in the armed services.

Reverting to a few of the circumstances surrounding Babbitt's layoff necessary to be mentioned in bringing the issues before this Court: Babbitt had been active in the Union in the spring and summer of 1941 and during a strike at petitioner's studio during that summer. [R. 1379-1380.] The strike was concluded through the efforts of the United States Conciliation Service, members of which acted as arbitrators in settling certain issues resulting in a closed-shop collective bargaining agreement between petitioner and the Union on August 2, 1941. This collective bargaining agreement included a grievance and arbitration procedure for all disputes. [R. 1380.] The studio was closed down for a period of four weeks pending reorganization as a result of the strike, but opened on September 11, 1941, and all employees who had been dismissed during the strike were reinstated. This included reinstatement of Babbitt at the same time. [R. 1380-1381.] Approximately 250 employees were laid off at the time the studio reopened, pursuant to a formula determined by the arbitrators and agreed to by the Union and petitioner. However, Babbitt was reinstated as an animator at petitioner's studio. [R. 1381.] Thereafter, the volume of production having dropped off very materially, a further layoff of 98 employees, including eleven animators, was determined upon and carried out on November 24, 1941. Included among the 98 thus laid off was Arthur Babbitt, one of eleven animators in that layoff group. [R. 1381.] It was this layoff of Babbitt that resulted in his filing the charge with the Board the following May, of an unfair labor practice, which resulted in the hearing and order above outlined.

Of the 98 employees laid off on November 24, 1941, approximately ten filed grievances with the Grievance and

Arbitration Committee in accordance with the grievance and arbitration procedure of the collective bargaining agreement. All those grievances were amicably settled. [R. 844-863.] Many other grievances have been taken up in accordance with the grievance provisions of the collective bargaining agreement, and every one of them has been satisfactorily settled. [R. 862-864.]

The only grievance arising out of the layoff of November 24, 1941, that was not submitted to the Grievance and Arbitration Committee, in accordance with the Union agreement, was the claim of Babbitt that he had been discriminatorily discharged. Babbitt had advised the Business Agent of the Union that his, Babbitt's, case should not be taken up with the other grievances, and that he, Babbitt, would take up his grievance separately, stating that he was in a separate category by reason of the special provision in the arbitrator's award of August 2, 1941.*

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*The special reference to Babbitt in the Award of August 2, 1941, is as follows:

> "However, with respect to the case of Art Babbitt, it is the judgment of the arbitrators that he be reinstated to his former position and not subject to discharge incident to reorganization, except for cause." [R. 336.]

Such reference in the Award afforded this particular employee no ground for refusing to follow the grievance and arbitration procedure in the settlement of his grievance that his layoff on November 24, 1941, was improper. His claim in that regard was simply "a dispute" which called for settlement through the grievance and arbitration procedure. Petitioner's position is that the term "incident to reorganization," had a well defined and well understood meaning. "Reorganization" was intended to refer to the reopening of petitioner's studio in the first part of September, 1941, at which time approximately 250 employees were laid off. It was known at the time of the Award that a large layoff "incident to reorganization" of the studio was necessary, due to lack of available production work at the studio. [R. 336.] After this reorganization was completed, in the middle of September, 1941, and after the studio had

[R. 844-845.] Instead of following the grievance and arbitration procedure, Babbitt, six months later, on May 28, 1942, filed the unfair labor practice charge with the Board. [R. 1-2.]

Prior to the expiration of the period of the collective bargaining agreement of August 2, 1941, which expired in October, 1942, a new collective bargaining agreement was negotiated between petitioner and the Union, dated October 6, 1942, for a period of two years from that date. This new collective bargaining agreement contained an express provision for grievances and arbitration of all disputes between Union members and petitioner. [R. 868, 877-879.] This new collective bargaining agreement likewise contained a closed-shop provision. It might be added that the closed shop and collective bargaining agreement between the Union and petitioner has been in effect at all times and is presently in effect, containing like provisions.

Petitioner and the Union have faithfully followed the collective bargaining agreements, including the closed-shop and grievance procedures. [R. 863-868.]

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been reopened and was in full operation, an entirely new situation arose due to further decline in business. The layoff of 98 persons on November 24, 1941, was the result of the further decline in business two months after the studio had been reorganized and reopened. Hence the layoffs on November 24, 1941, were not, as petitioner views it, in any way "incident to reorganization." Hence, petitioner was free to exercise its managerial judgment with respect to this employee as well as all other employees in that, and all future, layoffs.

But whether or not petitioner was right in this contention, merely created "a dispute" under the terms of the collective bargain. This dispute, as well as any other, was and is subject to the arbitration procedure of the collective bargain. This particular employee had no more right to refuse to submit this matter of interpretation and dispute to arbitration than he had to refuse arbitration on any other type of dispute.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that Babbitt might take his grievance, involving a discharge issue, directly to the Board as an unfair labor practice charge, rather than having it settled through the collective bargaining agreement's procedure for arbitrating grievances, in view of the closed-shop collective bargaining agreement between petitioner and the Union in effect at all material times, whereby the Union and all its members were bound first to present any grievance or dispute for final settlement through the grievance and arbitration procedure.

2. In holding that there was or could have been any evidence in support of the Board's finding that the *purpose* and *effect* of Babbitt's layoff was to encourage or discourage membership in any labor organization, within the meaning of Section 8(3) of the National Labor Relations Act, in view of the closed-shop collective bargaining agreement in effect at all material times.

3. In holding that, in any event, the Board's order of reinstatement should not be modified to delete the punitive feature of the order requiring reinstatement of Babbitt upon his discharge from the armed services of the United States, without imposing the same limitations and conditions as contained in Section 8(b) of the Selective Training and Service Act.

Reasons for Granting the Writ.

1. The decision of the Circuit Court of Appeals, holding that the Board may hear and determine the grievance, involving a discharge issue, as an unfair labor practice charge, without compelling the employee first to follow the grievance and arbitration procedure contained in the collective bargaining agreement between the employer and his Union, involves an important question of Federal law which has not been, but should be, settled by this Honorable Court. It is believed that this question is a highly important one, since it affects the integrity of innumerable collective bargaining agreements containing like grievance and arbitration provisions calling for the peaceful and amicable settlement of just such labor disputes. A rule allowing resort to the courts in such cases, without requiring the parties first to exhaust their remedy by arbitration, defeats the very purpose of collective bargaining. Our research has not disclosed another proceeding in which this question has been squarely presented for decision, either to the Circuit Courts of Appeals or to this Honorable Court.

2. The decision of the Circuit Court of Appeals in this proceeding is in conflict with the Second, Fourth, Fifth and Seventh Circuit Courts of Appeals in holding that there need be no substantial evidence that both the *purpose* and *effect* of a discharge found to be discriminatory is to encourage or discourage membership in any labor organization within the meaning of Section 8(3) of the Act.

3. The decision of the Circuit Court of Appeals, in refusing to impose the limitations and conditions of Section 8(b) of the Selective Training and Service Act of

1940 upon petitioner's duty of reinstatement of Babbitt when he is discharged from the armed services, involves the decision of a Federal question in a way that is probably in conflict with applicable decisions of this Honorable Court.

Petitioner respectfully represents that said questions properly appear in the record and were raised before the Trial Examiner, the Board, and the Circuit Court of Appeals.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue out of and under the Seal of this Honorable Court directed to the Circuit Court of Appeals for the Ninth Circuit, requiring the said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings in said Circuit Court of Appeals in the case numbered 10603 and entitled "National Labor Relations Board, Petitioner, vs. Walt Disney Productions, Respondent," to be reviewed and determined by this Honorable Court as provided by law; that the judgment of said Circuit Court of Appeals herein be reversed by this Honorable Court; and for such further relief as to this Court may seem proper.

Dated February 23, 1945.

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